

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

VIRGINIA L. BAKKER,  
Plaintiff,  
vs.

03:10-cv-00082-HU

**FINDINGS AND  
RECOMMENDATIONS**

WELLS FARGO HOME MORTGAGE, a  
division of WELLS FARGO BANK,  
N.A., a national corporation;  
FREDDIE MAC, a government-  
sponsored enterprise; and WACHOVIA  
MORTGAGE CORP., a North Carolina  
corporation,  
Defendants.

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Phil Goldsmith  
Nanina D. Takla  
Law Office of Phil Goldsmith  
1618 SW First Avenue, Suite 350  
Portland, OR 97201  
Telephone: (503) 224-2301  
Facsimile: (503) 222-7288

Attorneys for Plaintiff

Jonathan M. Radmacher  
McEwen Gisvold LLP  
1100 SW Sixth Avenue, Suite 1600  
Portland, OR 97204  
Telephone: (503) 412-3522  
Facsimile: (503) 243-2687

Attorney for Defendants

1 - FINDINGS AND RECOMMENDATIONS

1 HUBEL, J.,

2 This action arises from a January 29, 2007 mortgage loan  
3 transaction on the residence of plaintiff Virginia Bakker  
4 ("Plaintiff") located at 3434 NE 77th Street in Portland, Oregon.  
5 Plaintiff filed her complaint on January 27, 2010, alleging a  
6 single cause of action for rescission under the Truth in Lending  
7 Act ("TILA"), 15 U.S.C. § 1601 et seq., against defendants Wells  
8 Fargo Home Mortgage ("Wells Fargo"), Federal Home Loan Mortgage  
9 Corporation ("Freddie Mac"), and Wachovia Mortgage Corporation  
10 ("Wachovia") (collectively, "Defendants"). Now before the court is  
11 Defendants' motion for summary judgment pursuant to Federal Rule of  
12 Civil Procedure ("Rule") 56(c). For the reasons set forth below,  
13 the Court recommends that Defendants' motion (Docket No. 74) for  
14 summary judgment be **DENIED**.

15 **I. BACKGROUND**

16 On January 29, 2007, Plaintiff executed a promissory note  
17 ("the Note") in the amount of \$125,000 and a Deed of Trust against  
18 her real property, securing the Note. The Note provided for  
19 interest to accrue at the rate of 6.25% per annum. At that time,  
20 Plaintiff had sufficient income to afford the monthly principal and  
21 interest payment of \$769.65, as well as the monthly escrow for  
22 taxes and insurance. However, after the economic down-turn in  
23 2008, Plaintiff stopped making her mortgage payments in January of  
24 2009 because she could no longer afford them.

25 On January 27, 2010, Plaintiff filed this action against  
26 Defendants claiming violations of TILA and seeking statutory  
27 damages under § 1640(a)(2), rescission under § 1635, and attorneys'  
28 fees under § 1640(a)(3).

1 In July of 2011, while preparing to mediate the case,  
2 Plaintiff was offered a loan modification under the Home Affordable  
3 Modification Program ("HAMP"), 12 U.S.C. § 5219a. HAMP "is a  
4 federal program whereby the United States government privately  
5 contracts with banks to provide incentives to enter into  
6 residential mortgage modifications." *Nevada v. Bank of Am. Corp.*,  
7 672 F.3d 661, 665 (9th Cir. 2012).<sup>1</sup> As part of the loan  
8 modification process under HAMP, Plaintiff was required to make  
9 three trial period payments of \$779.81, which were due on August 1,  
10 2011, September 1, 2011, and October 1, 2011.

11 On December 19, 2011, after making timely trial period  
12 payments, Plaintiff signed a permanent loan modification agreement  
13 under HAMP, which was executed on behalf of Wells Fargo on March 6,  
14 2012. The HAMP agreement decreased Plaintiff's monthly principal  
15 and interest payment by over \$170 for five years, lowered her  
16 interest rate (i.e., interest was to accrue at the rate of 2% per  
17 annum for five years, 3% per annum for the sixth year, and 4% per  
18 annum thereafter), and added nearly two years to the loan's  
19 maturity date. By signing the HAMP agreement, Plaintiff also  
20 agreed to the following provisions:

21 That this Agreement shall supersede the terms of any  
22 modification, forbearance, Trial Period Plan or Workout  
23 Plan that I previously entered into with Lender.

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24 <sup>1</sup> "In March 2009, the United States Department of Treasury  
25 announced the details of the Home Affordable Modification Program  
26 as part of the Making Home Affordable Program. Under HAMP,  
27 individual loan servicers voluntarily enter into contracts with  
28 Fannie Mae, acting as the financial agent of the United States, to  
perform loan modification services in exchange for certain  
financial incentives." *Id.* (citing *Newell v. Wells Fargo Bank,*  
*N.A.*, 2012 WL 27783, at \*1 (N.D. Cal. Jan. 5, 2012)).

1 . . . .

2 That the Loan Documents are composed of valid, binding  
3 agreements, enforceable in accordance with their terms  
4 and are hereby affirmed.

5 (Radmacher Decl. Ex. 103 at 3-4.)

6 It is Plaintiff's position, however, that she did not intend,  
7 nor did she agree, to relinquish her right of rescission under  
8 TILA. In fact, Plaintiff's counsel represents to the Court that  
9 there was a mutual understanding that Plaintiff would be able to  
10 continue pursuing her case against Defendants. This issue lies at  
11 the heart of Defendants' motion for summary judgment and  
12 Plaintiff's opposition thereto.

## 13 **II. LEGAL STANDARD**

14 Summary judgment is appropriate "if pleadings, the discovery  
15 and disclosure materials on file, and any affidavits show that  
16 there is no genuine issue as to any material fact and that the  
17 movant is entitled to judgment as a matter of law." FED. R. CIV.  
18 P. 56(c). Summary judgment is not proper if factual issues exist  
19 for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.  
20 1995).

21 The moving party has the burden of establishing the absence of  
22 a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477  
23 U.S. 317, 323 (1986). If the moving party shows the absence of a  
24 genuine issue of material fact, the nonmoving party must go beyond  
25 the pleadings and identify facts which show a genuine issue for  
26 trial. *Id.* at 324. A nonmoving party cannot defeat summary  
27 judgment by relying on the allegations in the complaint, or with  
28 unsupported conjecture or conclusory statements. *Hernandez v.*  
*Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus,

1 summary judgment should be entered against "a party who fails to  
2 make a showing sufficient to establish the existence of an element  
3 essential to that party's case, and on which that party will bear  
4 the burden of proof at trial." *Celotex*, 477 U.S. at 322.

5 The court must view the evidence in the light most favorable  
6 to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d  
7 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the  
8 existence of a genuine issue of fact should be resolved against the  
9 moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).  
10 Where different ultimate inferences may be drawn, summary judgment  
11 is inappropriate. *Sankovick v. Life Ins. Co. of N. Am.*, 638 F.2d  
12 136, 140 (9th Cir. 1981).

13 However, deference to the nonmoving party has limits. The  
14 nonmoving party must set forth "specific facts showing a genuine  
15 issue for trial." FED. R. CIV. P. 56(e). The "mere existence of  
16 a scintilla of evidence in support of plaintiff's positions [is]  
17 insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252  
18 (1986). Therefore, where "the record taken as a whole could not  
19 lead a rational trier of fact to find for the nonmoving party,  
20 there is no genuine issue for trial." *Matsushita Elec. Indus. Co.,*  
21 *Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal  
22 quotation marks omitted).

### 23 **III. DISCUSSION**

24 This case raises the issue whether a plaintiff-consumer may  
25 exercise his or her right of rescission under TILA, despite  
26 agreeing to a subsequent loan modification under HAMP.

27 Defendants argue that, by agreeing to the HAMP agreement's  
28 favorable and unambiguous terms, Plaintiff ratified the original

1 loan and relinquished her right of rescission. Plaintiff counters  
2 by arguing that the "parties understood the modification was  
3 completely separate from litigation of [her] TILA rescission  
4 claim." (Pl.'s Resp. at 6.) In fact, Plaintiff claims Defendants'  
5 former counsel "made clear that [she] could receive a permanent  
6 modification without waiving her TILA rescission claim." (Pl.'s  
7 Resp. at 6.)

8 In terms of case law, Defendants' counsel concedes "[t]here  
9 appears to be no cases, in either federal or state court, where a  
10 party seeking to exercise rescission rights under TILA has entered  
11 into a written modification agreement after filing suit, which  
12 explicitly re-affirms the validity of the Note and Deed of Trust."  
13 (Defs.' Mem. Supp. at 4.) Plaintiff's counsel also characterizes  
14 the question presented in this case as one of first impression.  
15 (Pl.'s Resp. at 2.)

16 Perhaps the most instructive case, according to Defendants'  
17 counsel, is *In re Crevier*, 820 F.2d 1553 (9th Cir. 1987). There,  
18 a married couple, the Creviers, filed a petition in bankruptcy and  
19 then proceeded to secure a loan by conveying a trust deed on estate  
20 property without the trustee's or bankruptcy court's consent. *Id.*  
21 at 1554. Upon learning of the loan, the trustee sued the lender  
22 "to avoid the trust deed under 11 U.S.C. § 549, alleging that the  
23 [p]roperty belonged to the [bankruptcy] estate and that the  
24 transfer of the trust deed was therefore an unauthorized post-  
25 petition transfer." *Id.* at 1554. The trustee and lender, with the  
26 bankruptcy court's authorization, entered into a settlement  
27 agreement whereby the lender promised to pay the estate \$50,000 in  
28 exchange for the trustee ratifying the lender's trust deed. *Id.*

1 Soon thereafter, the Creviers brought an action under TILA to  
2 rescind the trust deed and loan. *Id.*

3 Pursuant to § 1635, "consumers have the right to rescind a  
4 security interest in property which is their principal dwelling  
5 only if they possess an ownership interest and thus have the right  
6 to convey the security interest." *Id.* at 1556. Because the  
7 Creviers attempted to convey, as security for the loan, estate  
8 property which they did not own and had no right to convey (i.e.,  
9 since the property passed by operation of law to the Chapter 7  
10 estate upon commencement of the bankruptcy proceeding), the Ninth  
11 Circuit held that the loan was not a transaction secured by their  
12 property interest in their residence as required under TILA. *Id.*  
13 at 1557. The Creviers therefore failed to state a claim for  
14 rescission of the loan and deed of trust. *Id.*

15 Defendant's counsel urges the Court to follow the logic found  
16 in a footnote in *Crevier*, where the Ninth Circuit stated: "Nor did  
17 the Creviers acquire any TILA rescission rights from the trustee  
18 when the trustee abandoned the [p]roperty to the Creviers. The  
19 trustee extinguished any right to rescind he might have had under  
20 TILA by ratifying [the lender]'s trust deed in settlement of his  
21 action to avoid the lien." *Id.* at 1557 n.4.<sup>2</sup> The Ninth Circuit  
22 has also recognized, albeit in another context, that the act of  
23 refinancing an existing loan transaction cuts off the right of  
24 rescission as to the earlier loan. *See King v. State of Cal*, 784

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27 <sup>2</sup> "If an asset has been formally scheduled under § 521(a)(1)  
28 but has not been administered by the trustee when the estate is  
closed, the asset is abandoned to the debtor by operation of law."  
*In re Furlong*, 660 F.3d 81, 86 (1st Cir. 2011).

1 F.2d 910, 913 (9th Cir. 1986) ("The loan of March 1981 cannot be  
2 rescinded, because there is nothing to rescind. [Plaintiff]  
3 refinanced that loan in November 1981, and the deed of trust  
4 underlying the March 1981 loan has been superseded.") *But see Handy*  
5 *v. Anchor Mortg. Corp.*, 464 F.3d 760, 765 (7th Cir. 2006) (agreeing  
6 with the Sixth Circuit's rejection of *King* because the TILA  
7 legislation and regulations do not state "that the act of  
8 refinancing an existing loan transaction by itself cuts of the  
9 right of rescission." (quoting *Barrett v. JP Morgan Chase Bank,*  
10 *N.A.*, 445 F.3d 874, 878 (6th Cir. 2006))).

11 Citing *Parker v. De Kalb Chrysler Plymouth*, 673 F.2d 1178  
12 (11th Cir. 1982), Plaintiff claims that Defendants' ratification  
13 argument is contrary to TILA. In *Parker*, the Eleventh Circuit held  
14 that a borrower's release did not bar her TILA claim because they  
15 were "convinced that she was unaware that the release encompassed  
16 her TILA rights." *Id.* at 1182. More importantly, *Parker* emphasized  
17 that the release itself did not contain any reference to  
18 prospective TILA claims and instead used the boiler plate language  
19 of "any and all claims." *Id.* Because the public relies heavily on  
20 individual consumers acting as "private attorneys general" to  
21 effectuate the disclosures required under TILA, *id.* at 1181, *Parker*  
22 concluded that "consumers may . . . be unfairly deceived if [courts  
23 were to] allow such broad language to bar their claims under an  
24 Act . . . which was passed for the protection of all borrowers,  
25 both gullible and sophisticated." *Id.*

26 I find the district court's decision in *Mills v. Home Equity*  
27 *Group, Inc.*, 871 F. Supp. 1482 (D.D.C. 1994), persuasive in light  
28 of the factual similarities to this matter. In *Mills*, the



1 plaintiff entered into a loan agreement on December 20, 1991, which  
 2 was secured by a deed of trust on her residence. *Id.* at 1484.  
 3 After failing to meet her monthly payment obligations, the  
 4 plaintiff, who was represented by pro bono counsel, entered into a  
 5 purported settlement agreement which restructured the loan and  
 6 included a release of any potential TILA claims she "had, have or  
 7 might have against Lender arising out of or relating to the  
 8 Original Loan documents[.]" *Id.* The plaintiff later defaulted on  
 9 the restructured loan and foreclosure proceedings ensued in May of  
 10 1994. *Id.* On June 9, 1994, the plaintiff sent the defendants a  
 11 notice of rescission, which was within the three-year period for  
 12 rescinding the December 20 1991 loan. *Id.* The *Mills* court held  
 13 that the waiver was ineffectual, stating:

14 TILA is important consumer protection legislation. Its  
 15 terms must be complied with meticulously. In this case,  
 16 there was clearly a violation of TILA. Because TILA was  
 17 violated, Plaintiff had the right to rescind which right  
 18 cannot be released or waived absent the narrowly drawn  
 19 circumstances found in TILA for such waiver. [See *infra*  
 20 at 10, lines 16-24.] As Defendant concedes, the waiver  
 21 provisions were not met.

19 . . . . .

20 Plaintiff properly exercised her right to rescind  
 21 within three years of the consummation of the loan  
 22 transaction. This right was not waived by the settlement  
 23 entered into with Defendant. Plaintiff was not told she  
 24 had the unequivocal right to rescind. . . . For there to  
 25 be any basis to argue that Plaintiff waived her  
 26 statutorily conferred rights, she would have had to at  
 27 the least been given the right to rescind and declined to  
 28 assert it.

At no time did Defendant[s] . . . offer her such a  
 right. Rather at all times, Defendant[s] . . . denied  
 that Plaintiff had a valid claim under the [TILA].

*Id.* at 1486.

1 In this case, the court has previously concluded that  
2 Plaintiff's allegations regarding deficient notice were sufficient  
3 to state a claim for rescission under TILA. See *Bakker v. Wells*  
4 *Fargo Home Mortg.*, No. 3:10-cv-00082-HU, 2011 WL 1124041, at \*4 (D.  
5 Or. Feb. 28, 2011) ("Reg[ulation] Z makes clear that failure to  
6 fill in the expiration date of the rescission form is a violation  
7 of TILA." (quoting *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*,  
8 791 F.2d 699 (9th Cir. 1986))). In ruling on Defendants' motion  
9 for summary judgment, the Court has been asked "to assume that the  
10 substantive basis for Plaintiff's TILA rescission claim was  
11 meritorious, and that she had a right to bring a claim under TILA  
12 to rescind the loan."<sup>3</sup> (Defs.' Mem. Supp. at 1.)

13 This assumption makes *Mills* all the more persuasive because,  
14 if "TILA was violated, Plaintiff [would have] the right to rescind  
15 which . . . cannot be released or waived absent the narrowly drawn  
16 circumstances found in TILA for such waiver." *Mills*, 871 F. Supp.  
17 at 1486. Regulation Z, promulgated by the Federal Reserve Board,  
18 indicates that a consumer "may modify or waive the right to rescind  
19 if the consumer determines that the extension of credit is needed  
20 to meet a bona fide personal financial emergency. To modify or  
21 waive the right, the consumer shall give the creditor a dated  
22 written statement that describes the emergency, specifically  
23 modifies or waives the right to rescind, and bears the signature of  
24 all of the consumers entitled to rescind." 12 C.F.R. §  
25 226.23(e)(1). Nothing in the record suggests the waiver provisions  
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28 <sup>3</sup> And in any event, no evidence has been presented indicating  
that a TILA violation has not occurred here.

1 were met, nor has Plaintiff been given the right to rescind and/or  
2 declined to assert it.

3 Neither party addressed the *Mills* decision in their briefing  
4 for the instant motion. As a result, during the May 31, 2012  
5 hearing, I invited the parties to submit supplemental briefing on  
6 the application of that decision to this case. Not surprisingly,  
7 Plaintiff acknowledges that "[t]he factual circumstances of *Mills*  
8 are remarkably similar to those here" and "buttresses the . . .  
9 conclusion that [D]efendants' motion for summary judgment should be  
10 denied." (Pl.'s Supp. Mem. at 3, 6.)

11 Most notably, Defendants argue *Mills* is factually  
12 distinguishable because the decision "addresses only the ability  
13 (or inability) of a party to waive or release a rescission claim  
14 which it would otherwise have the ability to bring under TILA."  
15 (Defs.' Supp. Br. at 2.) It seems somewhat inconsistent to make  
16 this argument when Defendants previously asked the Court "to assume  
17 that the substantive basis for Plaintiff's TILA rescission claim  
18 was meritorious, and that she had a right to bring a claim under  
19 TILA to rescind the loan." (Defs.' Mem. Supp. at 1.) Defendants  
20 also claim this case is more akin to *Tucker v. Beneficial Mortgage*  
21 *Co.*, 437 F. Supp. 2d 584 (E.D. Va. 2006) and *In re Divittorio*, 670  
22 F.3d 273 (1st Cir. 2012). Defendants' reliance on these cases is  
23 misplaced.

24 *Tucker* upheld a waiver incorporated into a settlement  
25 agreement negotiated by the state Attorney General on behalf of a  
26 class of consumers that the plaintiffs had joined. *Tucker*, 437 F.  
27 Supp. 2d at 587. *Tucker* determined that the TILA release did not  
28 undermine legislative intent because (1) the Attorney General

1 effectively took on the role of enforcing the provisions of TILA  
2 for consumers; (2) the plaintiffs were put on notice that the  
3 release of all claim could potentially encompass TILA claims; (3)  
4 there was little to no indication of unequal bargaining power; (4)  
5 the release was not a general one prepared by the creditor and  
6 presented to the borrower on a take-it-or-leave-it basis; and (5)  
7 the settlement imposed a penalty on the lender in order to ensure  
8 that it followed disclosure regulations in the future. *Id.* at 588.

9 In this case, unlike *Tucker*, the release procured by  
10 Defendants was far more general and Plaintiff claims she was not  
11 aware it encompassed her TILA claims. I am also not persuaded that  
12 Defendants have been penalized in such a way that will deter future  
13 disclosure violations. After all, under HAMP, "loan servicers  
14 enter into contracts with Fannie Mae, acting as the financial agent  
15 of the United States, to perform loan modification services in  
16 exchange for certain financial incentives." *Nevada*, 672 F.3d at  
17 665.

18 In *DiVittorio*, the plaintiff attempted to rescind the  
19 transaction more than six years after the consummation of the  
20 transaction and was not seeking to invoke his TILA right of  
21 rescission within the three-year statute of limitations.  
22 *DiVittorio*, 670 F.3d at 285-86. Because the plaintiff's right of  
23 rescission under TILA had long expired, the court determined that  
24 "his ability to waive any rescission right was not cabined by the  
25 requirements of" TILA or its regulations (i.e., 12 C.F.R. §  
26 226.23(3)(1)). *Id.* at 285. The First Circuit distinguished *Mills*  
27 on this ground. *Id.* n.9. With respect to the plaintiff's argument  
28 that recognizing his waiver would thwart TILA's policies, the First

1 Circuit observed that circumstances suggested that his waiver was  
 2 knowing and voluntary. *Id.* at 286-88. Based on the record before  
 3 me, that is not the case here.

4 In short, the *Mills* court's holding has been favorably cited  
 5 by a district court in the Ninth Circuit, *Hoffman v. Lloyd*, No 06-  
 6 2416 MHP, 2008 WL 298820, at \*2 n.1 (N.D. Cal. Feb. 1, 2008), and  
 7 I do so again today. Accordingly, Defendants' motion for summary  
 8 judgment should be **DENIED** because the waiver of rights under the  
 9 circumstances presented here thwarts the legislative policy which  
 10 TILA was designed to effectuate. See *Johnson v. Steven Sims*  
 11 *Subaru, Inc.*, No. 92 C 6355, 1993 WL 761231, at \*5 (N.D. Ill. June  
 12 9, 1993) (recognizing that TILA's "enforcement scheme would be  
 13 greatly hampered if lenders or lessors were permitted to procure  
 14 general releases of liability from TILA claims").

#### 15 **IV. CONCLUSION**

16 For the foregoing reasons, the Court recommends that  
 17 Defendants' motion (Docket No. 74) for summary judgment be **DENIED**.

#### 18 **V. SCHEDULING ORDER**

19 The Findings and Recommendation will be referred to a district  
 20 judge. Objections, if any, are due **July 16, 2012**. If no  
 21 objections are filed, then the Findings and Recommendation will go  
 22 under advisement on that date. If objections are filed, then a  
 23 response is due **August 2, 2012**. When the response is due or filed,  
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1 whichever date is earlier, the Findings and Recommendation will go  
2 under advisement.

3 Dated this 26th day of June, 2012.

4 /s/ Dennis J. Hubel

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6 DENNIS JAMES HUBEL  
7 Unites States Magistrate Judge  
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